

USEPA's vs Maine's Pesticide General Permit Approach 2010-2011

Maine has an existing system for regulating pesticides that places land-based pesticide use under the authority of the Maine Board of Pesticides Control and aquatic pesticide use under the authority of the Maine Department of Environmental Protection. However, a 2009 federal court decision requires changes to pesticide regulation nationwide. The USEPA has drafted a Pesticide General Permit (GP) program that could be used. Why is Maine developing its own program in response to the federal court mandate instead of using USEPA's draft program? USEPA's GP appears to specify what types of pesticide treatments are involved and has large area-based thresholds to determine which treatments need to apply for coverage and which are automatically covered by the GP. How is Maine's proposed GP different and why?

All italicized sections below are obtained directly from the USEPA document, Frequently Asked Questions on EPA's draft NPDES Pesticides General Permit (PGP).

“(US)EPA's PGP authorizes discharges to waters of the U.S. from the application of (1) biological pesticides, and (2) chemical pesticides that leave a residue for the following pesticide use patterns: mosquito and other flying insect pest control; aquatic weed and algae control; aquatic nuisance animal control; and forest canopy pest control”. This list is short, specific, and excludes much of the potential pesticide uses that occur in Maine. But, that doesn't mean that those other uses are exempt from the Clean Water Act. It must be noted that *“Any use patterns not covered by this proposed (USEPA) draft permit would need to obtain coverage under an individual permit or alternative general permit if they involve pesticide applications that result in point source discharges to waters of the United States”.* Specifically, *“This (USEPA) permit does not cover terrestrial (land based) applications for the purpose of controlling pests on agricultural crops or forest floors”*, frequent uses in Maine. Point source discharges are *“any discernable, confined, and discrete conveyance...”*, including all forms of equipment used to distribute pesticides. In other words, ALL pesticide use that may result in a discharge of materials to a water of the US now requires Clean Water Act approval and the draft USEPA GP does not necessarily provide that approval, leaving the applicator and landowner legally vulnerable. USEPA was asked *“Does the PGP cover discharges from pesticide applications near waters of the U.S. and how does (US)EPA define the term ‘near’?”* USEPA responded, *“Yes. Although the Court did not define the term ‘near’ in the context of pesticide discharges, (US)EPA interprets this term to refer to the unavoidable discharge to waters of the U.S. in order to target pests in close proximity to water, for example, treating weeds along the bank of a ditch through which water is flowing”.* “Near” and “in close proximity” are not defined, so affected treatment programs include those of varying distances from the water or wetland with a potential for contact. Maine DEP believes that this leaves many pesticide applicators without sufficiently clear guidance or a means to show that they manage pesticide use responsibly and will not cause contact with the water.

USEPA's GP uses large treatment area-based thresholds (640 acres for mosquitoes, other flying insect pests, and forest canopy pest control; 20 acres or 20 linear miles at water's edge for aquatic weed, algae, and aquatic nuisance animal control) for determining if a pesticide treatment program receives coverage with or without filing a Notice of Intent for Coverage (NOI, application) form. However, this is complicated in that *“For calculating annual treatment area totals, each pesticide application activity is counted as a separate activity. For example, applying pesticides twice a year to a 10-acre site should be counted as 20 acres of treatment area. Treating both sides of a 10-mile ditch is equal to 20 miles of water treatment area.”* Also, when an applicator works on more than one site as is common, all acreages for that applicator are accumulated toward these totals and the applicator may personally need to apply for permit coverage. Below these area thresholds, coverage is automatically

granted without filing an NOI form. All operators covered under USEPA's GP (NOI filers and non-filers) must adhere to: technology based requirements to minimize discharges to waters of the US, use the lowest effective amount of product; and perform regular maintenance on equipment. They must also adhere to water quality based requirements; conduct site monitoring; perform corrective actions; and maintain recordkeeping. NOI filers must also adhere to IPM methods, develop and follow a Pesticide Discharge Management Plan, and conduct annual reporting. Some of these requirements are incorporated in Maine's draft GP program as best management practices. The USEPA treatment area thresholds may appear generous to some applicators and the associated requirements with GP coverage may seem reasonable. However, Maine DEP is concerned whether this draft tool meets the requirements of the lawsuit and the Clean Water Act or whether it will result in further legal challenges. We are concerned with protecting Maine water quality and natural resources and providing legal coverage for well designed and well executed pesticide treatment programs.

What happens if we leave these questions with USEPA's draft GP unanswered, do not develop a Maine program, and let things proceed as they always have? USEPA states, *"Any operator with a point source discharge resulting from the application of pesticides will be in violation of the Clean Water Act if those discharges are not covered under an NPDES permit as of April 10, 2011. If a pesticide applicator is required to have an NPDES permit, but does not have permit coverage for any reason, the applicator could face a difficult choice. Choosing to apply the pesticide from which there is a discharge, the operator risks being found in violation of the Clean Water Act and subject to penalties of up to \$37,500 a day (In addition to possible FIFRA penalties). Alternatively, an applicator could decide not to apply a pesticide."* *"Also, the CWA provides for citizens to file suit"* against pesticide applicators and other parties. These choices have obvious implications for necessary pesticide treatment programs.

USEPA points out that *"Nothing in the Clean Water Act precludes a state from adopting or enforcing requirements that may be more appropriate to address discharges in their state or are more stringent or more extensive than those required under the NPDES regulations while still meeting their obligations under the Clean Water Act."* Maine has decided to do just that, in order to address uncertainties in the draft USEPA approach with protection of water quality, natural resources, and legal protection for applicators and landowners.

Maine is developing a program that will identify those activities that are not anticipated to result in a discharge of pesticides to waters of the State and eliminate them from further regulation. To do this, Maine DEP and Maine BPC are working together to develop best management practices (BMPs) and minimum critical distances (MCDs) from natural resources. Many of these are tools that are already commonly used, while others borrow practices from other types of applications in response to site concerns and lessons learned. When implemented, the BMPs and MCDs are anticipated to prevent contact with surface waters and remove the need for Maine DEP approval in the absence of a pollutant discharge. For those emergency activities that can't meet the BMPs and MCDs, Maine's Pesticide GP will provide for treatment projects in the interest of public health and safety and widespread economic harm. Maine DEP's existing regulatory program, which includes GPs for direct discharges of certain aquatic pesticides and the opportunity for individual permits when applicable, will still be available as well. This approach eliminates a great deal of uncertainty in the USEPA GP for pesticide applicators and concerned citizens alike. It encourages and rewards applicators who design and conduct pesticide treatment programs in economically and environmentally sound ways, with the least amount of regulatory burden. And, it does a better job of protecting Maine's environment.